

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RAHEEM SHABAZZ,

Petitioner,

v.

9:02-CV-0939
(LEK/GHL)

GARY H. FILION,

Respondent.

APPEARANCES:

OF COUNSEL:

OFFICE OF STEPHEN LANCE CIMINO STEPHEN LANCE CIMINO, ESQ.
Counsel for Petitioner

HON. ANDREW M. CUOMO LUKE MARTLAND, ESQ.
Attorney General of the State of New York Assistant Attorney General
Counsel for Respondent

LAWRENCE E. KAHN, U.S. DISTRICT JUDGE

DECISION and ORDER

By Decision and Order filed September 26, 2006, the Report-Recommendation of Magistrate Judge George H. Lowe was approved and adopted in its entirety and the petition for habeas corpus relief was denied and dismissed. Dkt. No. 56. Petitioner appealed that dismissal to the United States Court of Appeals for the Second Circuit. Dkt. No. 58.

By Mandate filed February 29, 2008, the Second Circuit dismissed the appeal without prejudice to the appeal being reinstated within thirty (30) days from the entry of an order by this Court granting or denying a certificate of appealability ("COA"). Dkt. No. 61.

Appeals to the Court of Appeals in habeas corpus proceedings are governed by 28 U.S.C. § 2253, which provides in relevant part that:

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

- (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
- (B) the final order in a proceeding under section 2255.¹

A COA may only be issued “if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).

Petitioner has not submitted a request for a COA separate from his notice of appeal in this action. The Second Circuit has held, however, that a notice of appeal may be construed as a motion for a COA. See Marmolejo v. United States, 196 F.3d 377, 378 (2d Cir. 1999) (citing Hooper v. United States, 112 F.3d 83, 88 (2d Cir.1997)).

Accordingly, the notice of appeal filed by petitioner is hereby deemed to also constitute a request for a COA.

After reviewing the file, and for the reasons set forth in the Court’s prior Decision and Order and Magistrate Judge Lowe’s Report-Recommendation in this action, the Court finds that the petitioner has failed to make the showing required for issuance of a COA.

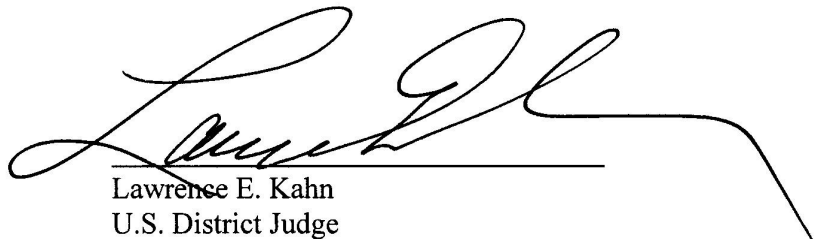
WHEREFORE, it is hereby

ORDERED, that the Court declines to issue a COA in this action, and it is further

ORDERED, that the Clerk serve a copy of this Order on the parties.

IT IS SO ORDERED.

Date: March 20, 2008
Albany, New York



Lawrence E. Kahn
U.S. District Judge

¹ Rule 22 of the Federal Rules of Appellate Procedure also provides that an appeal may not proceed “unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c).” Fed.R.App.P. 22(b).